Supreme Court, U.S.
FILED

(1)

03 428 JUL 14 2003

No. _____

In The

Supreme Court of the United States

Willie E. Pratt, and
Bernard Garrett,

Pro Se Petitioners

v.

City of Houston, Texas,

Respondent

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Anthony Hall
City Attorney
Donald Fleming
Sr. Ass't. City Attorney
City of Houston
P. O. Box 1562
Houston, Texas 77251
(713) 247-2000

Bernard Garrett, *Pro Se*
Pro Se Petitioner
2703 Bringhurst
Houston, Texas 77026
(713) 723-0449
(832) 876-1095

150 pp

QUESTIONS PRESENTED

Why did the Southern District Court allow all legal representation to waive the rights for a trial by a jury knowing the Fifth Circuit Court of Appeals reversed and remanded this case back to the district court and stated not for the court to be inconsistent with their opinion ruling? See U.S. Constitution, 14th Amendment, Articles VI and VII; Title VII of the Civil Rights Acts of 1964 as amended; Costa v. Desert Palace, Inc. 299 F.3d 838, 2002 U.S. App. LEXIS 15484 (9th Cir. Nev., 2002); and Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133 (2000).

List of Parties:

Joseph Amad, Attorney for Plaintiff Petitioners

C. Vance Christopher, Attorney for Plaintiff Petitioners

Sim Lake, Judge for Southern District Court, Houston, Texas

Fifth Circuit Court of Appeals, Smith, Wiener, and Barksdale Fifth Circuit Court of Appeals, En Banc

Anthony Hall, City Attorney for Respondent

Cons[illegible]ce Acosta, Supervising Attorney

Donald Fleming, Sr. City Attorney

Debra Schriefer Caldwell, Assistant City Attorney

Monticella Flanakin, Attorney and Counsel for Respondent

1. Why did the lower court knowingly ignore what the Fifth Circuit Court of Appeals ordered and conducted this trial without a jury knowing that civil liability decisions, weighing of the evidence, credibility determinations and drawing inferences from the facts are jury functions only? See U.S. Constitution, 14th Amendment, Articles VI and VII; Title VII of the Civil Rights Acts of 1964 as amended; Costa v. Desert Palace, Inc. 299 F.3d 838, 2002 U.S. App. LEXIS 15484 (9th Cir. Nev., 2002); and Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133 (2000).

List of Parties:

Joseph Amad, Attorney for Plaintiff Petitioners

C. Vance Christopher, Attorney for Plaintiff Petitioners

Sim Lake, Judge for Southern District Court, Houston, Texas

Fifth Circuit Court of Appeals, Smith, Wiener, and Barksdale Fifth Circuit Court of Appeals, En Banc

Anthony Hall, City Attorney for Respondent

Constance Acosta, Supervising Attorney

Donald Fleming, Sr. City Attorney

Debra Schriefer Caldwell, Assistant City Attorney

Monticella Flanakin, Attorney and Counsel for Respondent

2. The Fifth Circuit Court of Appeals Remanded and Reversed this case back to the lower court (Southern District) as a matter of law. The Southern District Court ignored and misinterpreted the Fifth Circuit's first Opinion Ruling. The Plaintiff-Appellants went back

to the Fifth Circuit Court of Appeals to mandate the lower court to follow the upper court's interpretation of the law and opinion ruling. The Fifth Circuit Court of Appeals did not validate or uphold their own opinion first ruling. Why would the Fifth Circuit Court of Appeals (in the Plaintiff's second rehearing request and trial by jury) allow the lower court, Southern District court to make a decision contrary to the law and what they ordered in the Fifth Circuit Court's first opinion ruling? See Rule 10 (a) (b) (c) the U.S. Supreme Court Rules, (Part III, Rule 10 (a) (b) (c)); U.S. Constitution, 14th Amendment, Articles VI and VII; Title VII of the Civil Rights Acts of 1964 as amended; Costa v. Desert Palace, Inc. 299 F.3d 838, 2002 U.S. App. LEXIS 15484 (9th Cir. Nev., 2002); and Reeves v. Sanderson Plumbing Products, Inc.530 U.S. 133 (2000).

List of Parties:

Joseph Amad, Attorney for Plaintiff Petitioners

C. Vance Christopher, Attorney for Plaintiff Petitioners

Sim Lake, Judge for Southern District Court, Houston, Texas

Fifth Circuit Court of Appeals, Smith, Wiener, and Barksdale

Fifth Circuit Court of Appeals, En Banc

Anthony Hall, City Attorney for Respondent

Constance Acosta, Supervising Attorney

Donald Fleming, Sr. City Attorney

Debra Schriefer Caldwell, Assistant City Attorney

Monticella Flanakin, Attorney and Counsel for Respondent

3. Did both lower courts (Southern District and the Fifth Circuit Court of Appeals) err in ignoring the facts of law in this case? The facts relative to:

a) prima facie,

b) requesting additional evidence,

c) a trial by a jury,

d) the judge making the decisions which were only for a jury,

e) the upper and lower courts shifted the burden of proof to the plaintiffs-appellants, rather than the defendant. See U. S. Constitution, 14th Amendment, Articles VI and VII; Title VII of the Civil Rights Acts of 1964 as amended; Costa v. Desert Palace, Inc. 299 F.3d 838, 2002 U.S. App. LEXIS 15484 (9th Cir. Nev., 2002); and Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133 (2000).

List of Parties:

Joseph Amad, Attorney for Plaintiff Petitioners

C. Vance Christopher, Attorney for Plaintiff Petitioners

Sim Lake, Judge for Southern District Court, Houston, Texas

Fifth Circuit Court of Appeals, Smith, Wiener, and Barksdale

Fifth Circuit Court of Appeals, En Banc

Anthony Hall, City Attorney for Respondent

Constance Acosta, Supervising Attorney

Donald Fleming, Sr. City Attorney

Debra Schriefer Caldwell, Assistant City Attorney

Monticella Flanakin, Attorney and Counsel for Respondent

4. Why did the courts failed to address these issues of law and facts ? See U.S. Constitution, 14th Amendment, Articles VI and VII; Title VII of the Civil Rights Acts of 1964 as amended; Costa v. Desert Palace, Inc. 299 F.3d 838, 2002 U.S. App. LEXIS 15484 (9th Cir. Nev., 2002); and Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133 (2000).

5. Did the trial court (Southern District) and the Fifth Circuit Court of Appeals err when it concluded that race was not a factor and requested additional evidence? See Reeves v. Sanderson Plumbing Products Inc. 530 U.S. 133 (2000).

List of Parties:

Joseph Amad, Attorney for Plaintiff Petitioners

C. Vance Christopher, Attorney for Plaintiff Petitioners

Sim Lake, Judge for Southern District Court, Houston, Texas

Fifth Circuit Court of Appeals, Smith, Wiener, and Barksdale

Fifth Circuit Court of Appeals, En Banc

Anthony Hall, City Attorney for Respondent

Constance Acosta, Supervising Attorney

Donald Fleming, Sr. City Attorney

Debra Schriefer Caldwell, Assistant City Attorney

Monticella Flanakin, Attorney and Counsel for, Respondent

6. Why did the lower court take the liability from the jury in this case? Certainly the district court must have known and if not then the Fifth Circuit Court of Appeals should have known? See Reeves v. Sanderson Plumbing

Products Inc. 530 U.S. 133 (2000); Costa v. Desert Palace, Inc. 299 F.3d 838, LEXIS 15484 (9th Cir. Nev., 2002).

List of Parties:

Joseph Amad, Attorney for Plaintiff Petitioners

C. Vance Christopher, Attorney for Plaintiff Petitioners

Sim Lake, Judge for Southern District Court, Houston, Texas

Fifth Circuit Court of Appeals, Smith, Wiener, and Barksdale

Fifth Circuit Court of Appeals, En Banc

Anthony Hall, City Attorney for Respondent

Constance Acosta, Supervising Attorney

Donald Fleming, Sr. City Attorney

Debra Schriefer Caldwell, Assistant City Attorney

Monticella Flanakin, Attorney and Counsel for Respondent

7. Did Southern District Court err in their interpretation of what the Fifth Circuit Court of Appeals opinion ruling instructed them to do? And why wasn't the Plaintiffs/Appellants' second request to the Fifth Circuit upheld and enforced as a matter of law? See Reeves v. Sanderson Plumbing Products Inc. 530 U.S. 133 (2000).

List of Parties:

Joseph Amad, Attorney for Plaintiff Petitioners

C. Vance Christopher, Attorney for Plaintiff Petitioners

Sim Lake, Judge for Southern District Court, Houston, Texas

Fifth Circuit Court of Appeals, Smith, Wiener, and Barksdale Fifth Circuit Court of Appeals, En Banc

Anthony Hall, City Attorney for Respondent

Constance Acosta, Supervising Attorney

Donald Fleming, Sr. City Attorney

Debra Schriefer Caldwell, Assistant City Attorney

Monticella Flanakin, Attorney and Counsel for Respondent

8. When it was established by the Defendants, City of Houston, Texas in the lower District Court hearing and the Fifth Circuit Court of Appeals that denial of promotion to the better qualified black applicants, Willie Pratt and Bernard Garrett, plaintiffs in lieu of a lesser qualified white applicant, Edward Rutland was due to race and was a motivating factor may a plaintiff prove that a challenged employment practice creates disparate impact and denial of benefits afforded under Civil Rights Acts of 1964, as amended, § 1981, 42 U. S.C. § 1981, § 701 et seq., 2000e et al seq.?

List of Parties:

Joseph Amad, Attorney for Plaintiff Petitioners

C. Vance Christopher, Attorney for Plaintiff Petitioners

Sim Lake, Judge for Southern District Court, Houston, Texas

Fifth Circuit Court of Appeals, Smith, Wiener, and Barksdale Fifth Circuit Court of Appeals, En Banc

Anthony Hall, City Attorney for Respondent

Constance Acosta, Supervising Attorney

Donald Fleming, Sr. City Attorney

Debra Schriefer Caldwell, Assistant City Attorney

Monticella Flanakin, Attorney and Counsel for Respondent

10. When an employer knowingly uses a significantly different undisclosed test to prevent qualified minority employees from being promoted to upper level positions, may a plaintiff prove discriminatory disparate impact and special treatment given to the non minority, candidate who was special treatment?

List of Parties:

Joseph Amad, Attorney for Plaintiff Petitioners

C. Vance Christopher, Attorney for Plaintiff Petitioners

Sim Lake, Judge for Southern District Court, Houston, Texas

Fifth Circuit Court of Appeals, Smith, Wiener, and Barksdale

Fifth Circuit Court of Appeals, En Banc

Anthony Hall, City Attorney for Respondent

Constance Acosta, Supervising Attorney

Donald Fleming, Sr. City Attorney

Debra Schriefer Caldwell, Assistant City Attorney

Monticella Flanakin, Attorney and Counsel for Respondent

LIST OF PARTIES

Willie Pratt is representative of a class of all past, present and future non white employees of the City of Houston who have been, are or will continue to be discriminated against with regard to the terms and conditions of their employment because of their race, including denial of career growth and promotions and other benefits afforded them under Title VII of the Civil Rights Act of 1964.

Bernard Garrett Pratt is representative of a class of all past, present and future non white employees of the City of Houston who have been, are or will continue to be discriminated against with regard to the terms and conditions of their employment because of their race, including denial of career growth and promotions and other benefits afforded them under Title VII of the Civil Rights Act of 1964. Also Mr. Garrett continues to be harassed, retaliated against, and docked of his livelihood since filing this lawsuit.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i-viii

LIST OF PARTIES.....xiv

TABLE OF CONTENTS.....xv

TABLE OF CITED AUTHORITIES.....xvi

TABLE OF APPENDICES.....xxi

OPINIONS BELOW..... 1

STATEMENT OF JURISDICTION.....1

CONSTITUTIONAL PROVISIONS..... 2

ARGUMENT/CONFLICT OF FEDERAL LAW.....13

STATEMENT OF THE CASE.....18

STATEMENT OF FACTS.....19

REASONS FOR GRANTING THE PETITION 25

CONCLUSION.....30

TABLE OF CITED AUTHORITIES

Federal Cases:

Anderson v. Liberty Lobby Inc., 477 U.S. supra at 254.....9. 10

Bannistor v. Ullman, 287 F.3d 394, 401 (5th Cir. 2002).....21

Brown v. Trustees of Boston University, 891 F.2d 337(1st Cir. 1989).....21, 22

Burch v. City of Nacogdoches, 174F.3d 615, 618 (5th Cir. 1999).....29, 30

Casarez v. Burlington Northern/Sante Fe Co., 193 F.3d 334, 337 n.3 (5th Cir. 1999).....2, 4

Cf. Furnco Construction Corp., v. Waters 438 U.S. 567, 577 (1978).....16

Continental Oil Co., v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, n.6 (1962).....9,10

Corley v. Jackson Police Dept., 566 F.2d 994, 1001 (5th Cir. 1978).....13, 21, 26

Cited Authorities

Costa v. Desert Palace, Inc., 299 F.3d 838, LEXIS 15484 (9th Cir., Nev. 2002) .....i, ii, iv, vi, vii, ix, 6, 7,26

Derosher E. Price v. Federal Express Corp., (5th Cir. 2000).....2, 7, 8

Eastland v. T.V.A., 704 F.2d 613, 626(11th Cir. 1983).....22

Eberheim v. New York State Health Dept., 704 F.2d 613, 626 (11th Cir. 1983).....20, 21, 22

Fisher v. Vassar College, 114 F.3d 1332 (CA2 1997).....26

Kline v. TVA 128 F.3d, 337 (CA 6 1997).....5

Kona Technology Corp v. Southern Pacific Transp. Co., 225 F. 3d 595, 601, (5th Cir. 2000).....21

Lilly v. Harris Teeter Supermarket, 842 F.2d 1496(4th Cir. 1988).....21, 22

Lyle v. Household Mfg. Inc., 494 US 545, 554-555 (1990) 9

McDonnell Douglas Corp. v. Green 411 U.S. 792, 802 (1973), 528 U.S. 985 (1999).....5, 6, 10, 21, 26

Cited Authorities

Nowlin v. Resolution Trust Corp., 33 F.3d 498 (5th Cir. 1994).....29

Pratt and Garrett v. City of Houston, 247 F.3d at 601, 605, 606 (5th Cir. 2001) 21, 26

Redditt v. Mississippi Extended Care Centers, Inc. 718 F.2d 1381, 1386 (5th Cir. 1983).....20, 21

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).....i, ii, iv, vi, vii, x, 2, 3 7, 9,10,16, 17, 18 .....21,26, 28, 28, 29

Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (en banc)..... 26

Rubenstein v. Administrators of Tulane Educational Fund 218 F.3d 392, 399 (5th Cir. 2000).....6, 27

Rutherford v. Harris County, Texas 197, F3.d 173, 179 (5th 1999).....2, 4

Shackleford v. Deloitte & Touche, 190, F.3d 398 404 (5th Cir. 1999).....2, 4

St. Mary's Honor Center, supra at 524 (quoting Aikens, 460 U.S. at 716).....27

Vadie v. Mississippi State University, 218 F.3d 365, 373 (5th Cir. 2000) cert. denied 121 S. Ct. 1092 2001).....27

Cited Authorities

Valdez v. Church's Fried Chicken, Inc. 683 F.Supp. 596, 630 (W. D. Tex., 1988) 13

Walker v. Thompson, 214, F.3d 615, 624 (5th Cir. 2000) 5, 6, 27

CONSTITUTIONAL STATUES, REGULATIONS and COURT RULES:

Civil Rights Acts of 1866, 1871, 1981, 1983 and 1964.....i, ...vi, vii, xi, 2, 3, 4, 5, 11, 27

28 U.S.C. § 1254 (1)..... 2

42 U.S. C. § 2000e – 2 (a).....12

42 U.S. C. § 2000e – 2 (k).....12

42 U.S. C. § 2000e- 5 (g) (2) (B).....11

42 U.S. C. § 2000e-2 (m) 11

42 U.S.C. § 1964, as amended..... (See Title VII of the Civil Rights of Act of 1964, as amended).... i, iv, ...v, vi, vii, xi, 2, 3, 4, 11, 27

42 U.S.C. § 1981 .....2, 3, 4, 5,11, 27

42 U.S.C. § 1983.....3,11

Cited Authorities

42 U.S.C. § 2000e, et seq. 3,11

Age Discrimination and Equal Protection Clause of 14th Amend/Employment Act of 1997 (ADEA)..... 11,12

Equal Protection Clause of the Fourteenth (14th) Amendment, Art. VI, VII.....i, ii, iv, vi, vii, 2, 3, 12

Seventh (7th) Amendment.....38

Texas Commission on Human Rights Acts vol. 3, Doc. 3, ...3,12

Title VII of the Civil Rights Act of 1964, as amended.....i, ii, ,vi, vii, xi, 2, 3, 4, 5, 12, 27

U. S. Supreme Court Rules, Part III, Rule 10 (a) (b) (c).....iv, 3, 28, 30

TABLE OF APPENDICES

Appendix A – Fifth Circuit Court Appeals (Initial/First)

Opinion Ruling – Reversed and Remanded.....1a

Appendix B – Southern District Court Finding of Fact

Conclusion Of Law.....22a

Appendix C – Fifth Circuit Court of Appeals Second Opinion

Ruling, Decision (Unpublished).....36a

Appendix D - En Banc Hearing

(DENIED).....39a

TABLE OF APPENDICES

Appendix E – Brief of the Appellants' in the United States Fifth Circuit Court of Appeals For the Second Request.....42a

Appendix F- Appellants' Petition For Rehearing En Banc in the United States Fifth Circuit Court of Appeals.....88a

Petitioners of the State of Texas, City of Houston, Willie Pratt and Bernard Garrett respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals (5th Circuit), 5th Circuit, En Banc and the United States Southern District Court.

OPINIONS BELOW

The Court of Appeals Fifth Circuit Initial Opinion Ruling Reversed and Remanded (App A, p. 1a). The Southern District Court Facts of Finding/in favor of Defendant (App. B, p. 22a). The court of appeals, Fifth Circuit response to 2nd hearing request/Affirm lower court Unpublished (App. C , p.36a). The Fifth Circuit Court of Appeals, On Petition for Rehearing En Banc/Denied (App. D, p. 39a).

STATEMENT OF JURISDICTION

The court of appeals' judgment was filed on or about April 15, 2003. A timely petition for rehearing was denied on or About April 28, 2003, and on or about May 14, 2003 The Fifth Circuit Court of Appeals filed its denial of the Plaintiffs

Request for a Petition for Rehearing En Banc. (App. F, p. 88a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). This petition is filed with the U.S. Supreme Court in a timely fashion.

CONSTITUTIONAL PROVISIONS

At stake in this discrimination case is the integrity of the elements of the claims under Title VII of the Civil Rights Act of 1964, as amended and 42 U. S. C. § 1981, which is identical in Casarez v. Burlington Northern/Santa Fe Co., 193 F.3d 334, 337 n. 3 (5th Cir. 1999). Also, Rutherford v. Harris County, Texas 197 F.3d 173, 179 (5th Cir. 1999); Shackelford v. Deloitte & Touche, 190 F.3d 398, 404 (5th Cir. 1999) and Reeves v. Sanderson Plumbing, Inc., 530, U. S. 133 (2000) and Derosher Price v. Federal Express Corp., (5th Cir. 2002). This case raises important, recurring questions relating to the preemptive scope of violations to Federal Law interpretation and to establishing the requirement for a prima facie case of race discrimination and infringement upon the Equal Protection Clause the Fourteenth Amendment of the U. S.

Constitution, Constitutional Law, Due Process Clause in the 14th Amendment, the Right to a Jury for a Civil Trial under the 7th Amendment, (See Reeves v. Sanderson Plumbing Products Inc. 530 U.S. 133 (2000)); Protection from Employment Discrimination under Title VII and 42 U.S.C. § 1981, 42 U.S. C. § 1983 and 42 U.S. C. § 2000e et seq., and Texas Commission on Human Rights Act ("TCHRA"). Vol. 3, Doc. 3, pp. 1-9. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). The District Court had subject matter jurisdiction over Plaintiffs-Petitioners Willie E. Pratt ("Pratt") and Bernard Garrett's ("Garrett") cause pursuant to 42 U.S.C. § 2000e et seq., and 42 U. S. C. § 1981, 42 U. S. C. 1983 and the Equal Protection Clause of the Fourteenth Amendment and Supreme Court Rules Part III, Rule10 (a) (b) (c).

There is a Conflict in the courts. See U.S. Supreme Court Rules – Part III Rule 10(a) (b) (c). The hearing of this case in the Southern District Court and the decision made, conflicts with the Remanded and Reversed opinion ruling decision (first opinion ruling) of the Fifth Circuit Judges: Smith, Jolly and

Jones in the Court of Appeals, on or about November, 2000 and heard in the lower court (Southern District) in February, 2002. The Fifth Circuit Reversed and Remanded the case back to the lower courts for a trial by jury, to show: The Fifth Cir. Court of Appeals – Reversed and Remanded Opinion.

The elements of this case under Title VII, and 42 U.S.C. § 1981 are identical. Casarez v. Burlington Northern/Santa Fe Co.,193 F.3d 334, 337 n.3 (5th Cir. 1999) evaluating both claims using the same analysis.

Also, "for a prima facie case of race discrimination, a plaintiff must prove that 1) he is a member of a protected class; 2) he was qualified for the position; 3) he was not promoted; and 4) either the position was filled by someone not in the protected class, or the person was not promoted because of his race. See Rutherford v. Harris County, Texas, 197 F.3d 173, 179 (5th Cir. 1999): Shackleford v. Deloitte & Touche, 190 F.3d 398, 404 (5th Cir. 1999). Because Pratt and Garrett both are black, fit the minimum qualifications for the position, and

were not promoted to a position eventually filled by a white candidate, there is no question that they established a prima facie case of discrimination."

Also there is another conflict of the district court's interpretation of prima facie and other important federal issues under Title VII and 42 U.S.C. § 1981 that conflict with the initial decision of the upper court, Fifth Circuit Court of Appeals REVERSED and REMANDED. After the lower court (Southern Dist.) not following the directives of the Fifth Circuit court, the plaintiffs-petitioners brought a request to the Fifth Circuit again and the Circuit Judges Smith, Wiener and Barksdale, Fifth Circuit refused to stand by its own decision and upheld the lower court. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), 528 U.S. 985 (1999); Kline v. TVA, 128 F. 3d 337 (CA6 1997) (prima facie liability for intentional discrimination). In the original Opinion Ruling of the Fifth Circuit, Judges Jolly, Jones, and Smith sited the following case law, Walker v. Thornpson, 214 F.3d 615, 624

(5th Cir. 2000). "Summary judgment is proper when the evidence, viewed in the light most favorable to the non-movant, reflects no genuine issues of material fact." Rubinstein v. Administrators of the Tulane Educational Fund, 218 F.3d 392, 399 (5th Cir. 2000), cert. denied, 69 U.S.L.W. 3366 (U.S. Mar. 19, 2001)(No. 00-996). On a motion for summary judgment, a court reviews the facts in the light most favorable to the non-movant. Walker, 214 F.3d at 624.

In Pratt and Garrett v. the City of Houston, Texas, both African American males, in a Protective Class by law, met all the requirements for a "prima facie" and had presented substantial evidence in this case prior to remand and reversal to the lower court. However, the District Court allowed the Plaintiffs to be subjected to the shifting of the burden of proof to the Plaintiffs instead of the Defendant, City of Houston, Texas. See McDonnell Douglas Corp, v. Green, 411 U.S. 792, 802 (1973); See Desert Palace, Inc., DBA Caesars Palace Hotel & Casino, Petitioner v. Catharina F. Costa, case Costa v. Desert Palace, Inc., 299 F.3d 838, 2002 U.S. App. LEXIS

15484 (9th Cir. Nev., 2002). U.S. Supreme Court analysis on Labor & Employment Law Discrimination, Disparate Treatment Burden Shifting Analysis under 42 U.S.C. Section 2000e-2 (m), "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice. Direct discrimination is not required in mixed-motive cases." U.S. Supreme Justice O'Connor, "concurred in the judgment, concluded that the burden would shift only where a disparate treatment plaintiff could show by "direct evidence that an illegitimate criterion was a substantial factor in the employment decision." Id., at 276; See Reeves v. Sanderson Plumbing Products, Inc., June 12, 2000.

In Derosher Price v. Federal Express Corp., (5th Cir.2002), Judge Emilio Garza characterized the holding in Pratt I: "Finally, in cases where we have applied Reeves to reverse a district court's grant of summary judgment, the evidence of pretext was considerably more substantial than

the evidence present by Price. In Pratt, two unsuccessful candidates brought claims of racial discrimination after failing to receive a promotion. 247 F.3d at 605. We held that the plaintiffs had made a sufficient showing of pretext, in light of the plaintiffs' qualifications were superior, the successful candidate was given special treatment, and the supervisor had allegedly discriminated on previous occasions." Id 607.

The next area in which the District Court erred was to

try the case without a jury, one of the civil rights afforded under the Seventh Amendment of the U.S. Constitution is trial by jury for a civil matter. Plaintiffs in this case trusted the Judicial System to work. The system is no stronger than its consistent and unbiased interpretation of the law. The Southern District Court and the Fifth Circuit Court of Appeals both erred by allowing all legal representation to waive a trial by jury knowing the facts that the court must draw all reasonable inferences in favor of the non-moving party and it

may not make credibility determinations, or weighing of the evidence. Credibility determinations the weighing of the evidence and drawing of legitimate inferences from the facts are jury functions and not those of a judge. Therefore, a trial by jury should have been reinstated. See Reeves v. Sanderson Plumbing Product Inc., the U.S. Supreme Court opinion states, "In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weighing the evidence. Lyle v. Household Mfg., Inc., 494 U.S. 545, 554-555 (1990); Liberty Lobby, Inc., supra, at 254; Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, n. 6 (1962).

The Supreme Court Justice O'Connor stated in Reeves v. Sanderson Plumbing Products, Inc., "In doing so, however the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Lyle v. Household Mfg., Inc., 494 U.S. 545, 554-555 (1990);

Liberty Lobby, Inc., supra, at 254; Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, n.6 (1962). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Liberty Lobby, supra at 255.

Justice Ginsburg, concurring in the Reeves v. Sanderson Plumbing Products, Inc. case, stating, "...atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence: first, prima facie case as in the term used in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. Because the Court of Appeals in this case plainly, and erroneously, required the plaintiff to offer some evidence beyond those two

categories, no broader holding is necessary to support reversal."

The Supremacy Clause of the Constitution provides in relevant part: "The Laws of the United States *** shall be the supreme Law of the Land*** any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Constitution, The Equal Protection Clause of the 14th Amendment prohibits states from denying any person within its jurisdiction the equal protection of the law.

The Constitution of the United States also states under Article VI, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; ***under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Additional statues involved are 42 U.S.C. § 2000e et seq., 42 U. S. C. 2000e – 2 (m), 42 U. S. C. § 2000e-5 (g) (2) (B), 42 U.S.C. § 1981, 42 U.S.C. § 1983, Age Discrimination § Equal Protection Clause of the 14th

Amendment, Employment Act of 1997 (ADEA), Texas Commission on Human Rights, Title VII of the Civil Rights Act of 1964, as amended. This Protection of the Law was not provided under the law for Plaintiffs, Pratt and Garrett in the lower courts.

42 U. S. C. § 2000e-2(a): It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U. S. C. § 2000e-2(k): (1)(A) An unlawful employment practice based on disparate impact is established

under this title only if – (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;...

ARGUMENT/

CONFLICT OF FEDERAL LAW

The United States Southern District Court refused and ignored the Fifth Circuit's directives via the initial Opinion Ruling, "REVERSED and REMANDED" in case number 99-21166 in or about November, 2000 in which the appeal was filed timely. The Southern District Court entered a Summary Judgment for the Defendant, City of Houston without considering the ultimate issues of law, pretext and motivation. See Corley v. Jackson Police Depart., 566 F.2d 994 (5th Cir. 1978); Valdez v. Church's Fried Chicken, Inc., 683 F. Supp. 596, 630 (W. D. Tex., 1988).

The Southern District Court failed to properly address the evidence at the trial and the same court demarcated the essential findings in a previous appeal and the same court also misinterpreted and misapplied the letter of the law and rights afforded to the plaintiffs under the Constitution and civil rights law in this case. In Reply to the Brief of Appellants, Fifth Circuit, by David T. Lopez, attorney, it is stated, "the District Court failed to properly address the evidence at trial and this is particularly regrettable, since this court precisely delineated the essential findings in a previous appeal." See Reply to Brief of Appellants, pp. 4.

The trial court considered only the acknowledgement of non discriminatory motives of the City without considering disparity of treatment and departure from the regular practice of the City. Mr. Pratt, who was already performing the duties of the job for which he sought and had quite impressive experience with the City and the military was not referred because he did not "meet the minimum qualification". However, on the other hand Mr. Garrett was not considered for

the position because he refused to take a skills test, which the evidence showed was not required by the City's policy and practice, although Mr. Garrett had no objection to taking a skills test. On or about November, 2002 the 5th Circuit refused to uphold its original opinion ruling and enforce the law in the lower court. The facts are both Mr. Pratt and Mr. Garrett, male who are black exceeded the minimum qualifications in direct work experience, education and skills and a lesser qualified white applicant was given special treatment and received the Senior Inspector's position.

The above facts of interpretation of the law were ignored and/or misapplied in the lower court (Southern District) and upon the Plaintiffs-Petitioners second request to the Fifth Circuit Court of Appeals for reversing or remanding the case, the Fifth Circuit did not uphold their own initial opinion ruling. Severe conflict of federal law interpretation exists and conflict of decisions of important facts of federal law.

Finally, in quoting from Reeves v. Sanderson Plumbing Products, Inc., case review, Justice O'Connor delivered the following opinion: "the jury's verdict, the Court of Appeals misapplied the standard of review dictated under Rule 50. Again, the court disregarded critical evidence favorable to petitioner-namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation. See p.197 F.3d at 693-694. The court also failed to draw all reasonable inferences in favor of petitioner." See Furnco, 438 U.S. at 580 (evidence that employer's work force was racially balanced, while "not wholly irrelevant," was not "sufficient to conclusively demonstrate that [the employer's] actions were not discriminatorily motivated"). The Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's.

Justice O'Connor, and quoting from the review of Reeves v. Sanderson Plumbing Products, Inc., "In reaching this conclusion, however, we reasoned it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Specifically, we stated: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." Id., at 511. Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. See id., at 517. And lastly, "It suffices to say that, because a prima facie and sufficient evidence to reject the employer's explanation may permit a

finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.

The Plaintiffs-Petitioners are requesting the U.S. Supreme Court to interpret the facts of law in this case and render a decision of resolve. See Reeves v. Sanderson Plumbing Products, Inc., in quoting, Justice O'Connor's review "Given the evidence in the record supporting petitioner, 'we see no reason to subject the parties to an additional round of litigation before the Court of Appeals rather than to resolve the matter here."

STATEMENT OF THE CASE

Plaintiffs-Petitioners Pratt and Garrett are referred to collectively as employees or when individual reference is appropriate, by their surname. References to the City of Houston, Texas defendant-respondent, or as the City. The Department of Public Works and Engineering is referred to as "Public Works." This case is alleging racial discrimination in

their not being promoted to a Senior Position in the Department of Public Works and Engineering, the employees sued on October 28, 1998, asserting claims under the Civil Rights Act of 1866, and 1964, as amended. Summary Judgment was granted on November 12, 1999. Rec. 44. The Fifth Circuit Reversed and Remanded, Rec. 48.

In February, 2002 the lower district court conducted a hearing in Judge Sim Lake's court. The initial opinion ruling from the Fifth Circuit stated not to be inconsistent with this opinion ruling. All legal representatives failed to carry out this directives knowing that certain functions such as weigh in the facts, evidence and credibility are jury functions, only. Final judgment was entered on March 22, 2002. A timely notice of appeal was filed on March 22, 2002.

Statement of Facts

In the opinion reversing summary judgment on a finding there was sufficient evidence to infer that race was a factor in the City's failure to promote either Pratt or Garrett. Willie

Pratt and Bernard Garrett, both black men, were community service inspectors for the City of Houston's Department of Public Works and Engineering ("DWPE"). In July, 1997 DWPE posted a job opening for a senior inspector. The posting listed the position's minimum qualifications as (1) an associate's degree or certification/licensing in a technical specialty program of between 18 months and three years duration; (2) four years of experience investigating or inspecting criminal environmental pollution; (3) a valid Texas driver's license and compliance with the City's policy on driving. The posting also listed a preference for experience in criminal case development and environmental investigations. Under "Selections/Skills Tests Required," the posting stated, "NONE".

The Defendants, City gave an unofficial skills test and assisted the lesser-qualified white applicant, Edward Rutland with the test by giving him a book with the answers. The process was manipulated and special treatment was given to the lesser-qualified white applicant, Edward Rutland. See Eberheim v.

New York State Health Dept., 904 F.2d 161 (2nd Cir. 1990); Brown v. Trustees of Boston University, 891 F.2d 337 (1st Cir. 1989); Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); McDonnell Douglas Corp., v. Green, 411 U.S. 792 (1973); Corley v. Jackson Police Dept., 566 F.2d 994, 1001 (5th Cir. 1978); Redditt v. Mississippi Extended Care Centers, Inc., 718 F.2d 1381, 1386 (5th Cir. 1983); Bannistor v. Ullman, 287 F.3d 394, 401 (5th Cir. 2002) and Kona Technology Corp., v. Southern Pacific Transp. Co., 225 F.3d 595, 601 (5th Cir. 2000); Willie Pratt Bernard Garrett v. City of Houston.

As was stated in Mr. Joseph Ahmad and Mr. C. Vance Christopher's initial appeal request to the Fifth Circuit Court and quoting, "In fact, Rutland was not just less qualified, he was unqualified under the City's own policies and procedures because he did not meet the minimum qualifications for Senior Inspector. Vol. 2, Doc. 39, p.495. It is well established that promotions of lesser-qualified whites over more qualified blacks is proof in itself of pretext and therefore discrimination. See Eberheim v. New York State Health Dept., 904 F.2d 161

(2nd Cir. 1990) (reversing the lower court, the Second Circuit held that the defendant's failure to promote the most qualified individual "pointed to" discrimination, and therefore the case was remanded for a determination for damages); Brown v. Trustees of Boston University, 891 F. 2d 337 (1st Circ. 1989) (inference of pretext my reasonably be drawn where employee qualifications are at issue, and the successful applicant's qualifications are lower than the known qualifications of the plaintiff); Lilly v. Harris Teeter Supermarket, 842 F.2d 1496 (4th Cir. 1988) (pretext found when black employee with a good record was passed over in favor of a white with less education, less experience, and less seniority); Eastland v. T.V.A., 704 F.2d 613, 626 (11th Cir. 1983) Court of Appeals held trial court's finding of no discrimination concerning promotion decision to foreman was clearly erroneous where black plaintiff had more years of experience, had acted as a acting or substitute foreman, and the white selected had demonstrated attendance and drinking problems before the

selection)" stated in Mr. Ahmad and Mr. Christopher's in the prior appeal.

Testing of such should have never been given by Mr. Tom Collins. In fact, the reasons it was not disclosed on the job posting are: 1.) the test would have been given by someone other than Collins himself and no special treatment given to his designee 2.) the test would have been stated and disclosed in the job posting and 3.) could only be administered by the City of Houston "Central" Human Resources Department. Tom Collins, (a white male) Chief Inspector of the Neighborhood Protection Division DWPE, who supervised Garrett and was responsible for selecting the new senior inspector also attempted to change the minimum qualifications in an attempt to make the white applicant eligible for the position. However, Pratt and Garrett both applied for the senior inspector position. Pratt holds a BS Degree and a year of graduate school, two and a half years of experience as a pollution investigator for the Coast Guard, and had been a DPWE community service inspector for the prior two years.

Garrett had a Master's Degree and a Ph.D. (pending submission of his dissertation) in environmental engineering, and had spent four previous years as a community service inspector in DPWE. Pratt and Garrett were more than qualified for the Senior Inspector and were currently working in the department where the opening was, but neither were selected for the job. Tom Collins has a pattern of discrimination and this is not the first occurrence.

The selected candidate was not initially referred for the position by Sally Layman or Roderick Newman of the Central Human Resources Department because he did not meet minimum qualifications. However, with manipulation by Collins he was selected for the Senior Inspector job for which he did not qualify. The word Discrimination means, "bias, favoritism, prejudice, unfairness, inequality, bigotry, intolerance, and even hatred towards a group, a class or an individual because of their racial make up". All of the foregoing descriptions of the word discrimination was what Mr. Pratt and Mr. Garrett felt. Although Mr. Pratt and Mr.

Garrett were both already employed by the Defendant and more than exceeded the minimum qualifications and according to the Fifth Circuit Court of Appeals Original Opinion ruling stated they were the superior candidates for the position. Pratt and Garrett both experienced the Senior Inspector positions opening and closing on many other occasions and their not being considered for the job.

REASONS FOR GRANTING THE PETITION

There is a Conflict of law interpretation between the lower courts, Southern District and Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals said there is enough evidence for this case to be Reversed and Remanded to the lower court, which is the Southern District court for trial and for further proceedings not inconsistent with this opinion. The Southern District Court failed to follow the letter of the law of the upper court. The second request for rehearing from the Fifth Circuit Court of Appeals and the Fifth Circuit En Banc conflicts with the original hearing on racial discrimination and it also conflicts with decisions of other

court of Appeals, as well as decisions made by this court in other racial discrimination cases. See McDonnell Douglas Corp. v. Green, 411 U.S. 892, 802 (1973), Kline v. TVA, 128f.3d337 (CA6 1997), Corley v. Jackson Police Dept., 566 F.2d 994, 1001 (5th Cir. 1978); *Rhodes v. Guiberson Oil Tools, Desert Palace, Inc., DBA Caesars Palace Hotel & Casino, Petitioner v. Catharina F. Costa, case Costa v. Desert Palace, Inc.*, 299 F.3d 838, 2002 U.S. App. LEXIS 15484 (9th Cir. Nev., 2002). Fisher v. Vassar College, 114 F.3d 1332 (CA 2 1997) En Banc and Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133 (2000). "Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." A reasonable jury could have found that respondent's explanation for its employment decision was pretextual. See Pratt and Garrett v. City of Houston, 247 F.3d 601, 605 (5th Cir. 2001). Again, both lower courts (Southern District and Fifth Circuit Court of Appeals) erred.

Under the Title VII and 42 U.S.C. Section 1981 race discrimination claims the Fifth Circuit Court of Appeals found sufficient evidence to reverse and grant summary judgment by the district court. See Walker v. Thompson, 214 F.3d 615, 624 (5th Cir. 2000) and Rubenstein v. Administrators of the Tulane Educational Fund, 218 F.3d 392, 399 (5th Cir. 2000); Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148, 120 S.Ct. 2097 (2000); St. Mary Honor's Center v. Hicks, 509 U.S. 502, 511, 113 S.Ct. 2742 (1993) and Vadie v. Mississippi State University, 218 F.3d 365, 373 (5th Cir. 2000), cert. denied, 121 S. Ct. 1092 (2001). Also, in Reeves v. Sanderson Plumbing Products, Inc.,'s review, Supreme Court Justice O'Connor delivered the opinion for a unanimous Court and Justice Ginsburg filed a concurring opinion, and quoting, ("[P]roving the employer's reason false becomes part of (often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination").

Both the lower courts,(Southern District and Fifth Circuit Court of Appeals during the second request for reversal) erred when the Plaintiffs-Petitioners were required to produce additional evidence. Therefore, there is a matter of interpretation of law in both courts, which is not consistent with the United States Constitution and previous cases heard in the U. S. Supreme Court. See Reeves v. Sanderson Plumbing Products, Inc. 530 U. S. 133 (2000) and Supreme Court of the United States Rules Part III, Rule 10 (a) (b) (c) Considerations Governing Review on Writ of Certiorari which states, "a United States court of appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

The Fifth Circuit Court of Appeals and the Southern District Court/s have invoked two different interpretations of crucial law which conflicts with decisions made of other circuits. The Plaintiffs continued to seek justice in the Fifth Circuit Court of Appeals and in the lower court. In the second rehearing request the Fifth Circuit did not stand or enforce their own opinion ruling. Plaintiffs continued to seek relief in the judicial process by taking their appeal to the Fifth Circuit Court of Appeals, En Banc. The En Banc denied the request. The courts have entered a decision in conflict with the decision of another court of appeals and a lower federal court on a important federal matter of law. Therefore, an appeal for Writ of Certiorari by the U.S. Supreme Court is necessary to exercise and enforce the consistency of the United States Constitution and the Judicial process. This decision should be made by this court. See Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133 (2000). Nowlin v. Resolution Trust Corp., 33 F.3d 498, 500 n. 1 (5th Cir. 1994) and Burch v. City of Nacogdoches, 174 F.3d 615,

618 (5th Cir. 1999) and U.S. Supreme Court Rules, Part III Rule 10 (a) (b) (c).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

Bernard Garrett
2703 Bringhurst
Houston, Texas 77026
713/723-0449
832-876-1095
Plaintiff-Petitioner, Pro Se

Respondent Counsel:
Anthony Hall, City Attorney
Donald Fleming, Sr. Assistant Attorney
City of Houston, Texas
P.O. Box 1562
Houston, Texas 77251
713/247-2000